

No. 07-984

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IN THE  
**Supreme Court of the United States**

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COEUR ALASKA, INC.,

*Petitioner,*

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

*Respondents.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit**

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**BRIEF AMICI CURIAE OF THE  
NATIONAL MINING ASSOCIATION, ET AL.  
IN SUPPORT OF PETITIONER**

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**STATEMENT OF INTEREST OF  
AMICI CURIAE<sup>1</sup>**

The National Mining Association (“NMA”) is a national trade association that represents all aspects of the mining industry, including producers of most of

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<sup>1</sup> Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received notice at least 10 days prior to the due date of *amici’s* intention to file this brief. Pursuant to Rule 37.6, *amici* note that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief; copies of the consent letters have been filed with the Clerk.

America's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral-processing machinery and supplies; bulk transporters; financial and engineering firms; and other businesses related to mining. The mining industry produces vital resources needed to fuel our economy and manufacture virtually all commodities sold in domestic and foreign markets. In 2005, the U.S. mining industry produced \$78.4 billion of finished mineral, metal, and fuel products. These products were in turn used to create an additional \$2 trillion worth of consumer and industrial goods. *See* National Mining Association, *The Economic Contributions of the Mining Industry in 2005*, at 3 (2007).

The NMA works with Congress and regulatory officials to promote practices that foster the environmentally sound development and use of mineral resources. It also participates in litigation raising issues of concern to the mining community, *see, e.g.*, *National Mining Ass'n v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003), and has been involved in cases, like this one, in which parties have attempted to challenge the jurisdiction of the Army Corps of Engineers (the "Corps") to issue permits for "fill material" under the Clean Water Act. *See, e.g.*, *Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003).

*Amici* the Indiana Coal Council, Illinois Coal Association, Kentucky Coal Association, Coal Operators and Associates, Colorado Mining Association, West Virginia Coal Association, Pennsylvania Coal Association, Alabama Coal Association, Utah Mining Association, Arizona Mining Association, and New Mexico Mining Association represent the interests of

the coal and mining industries at the state level. Their goals are to provide effective industry leadership, enhance the industry's ability to compete, and educate citizens about the wise use of America's energy and mineral resources.

The *amici* have a substantial interest in this case. The Ninth Circuit's ruling below did not just get the Clean Water Act wrong; it got more than 30 years of industry practice and regulatory history wrong as well. By ignoring the practical realities that mines face in disposing of tailings—realities that Congress, the Corps, and the Environmental Protection Agency (EPA) all understood in creating separate regimes for effluent discharges and fill material—the Ninth Circuit embraced a rule that threatens to do great harm to America's miners. That is because the Ninth Circuit effectively adopted a categorical ban on a particular mining practice that the industry has relied on—and federal regulators have approved—for more than 30 years. Indeed, if permitted to stand, the Ninth Circuit's decision will leave some mines with nowhere to store the huge quantities of excess rock their operations produce. That will force those mines to cease operations—jeopardizing the economies of the States in which they operate and the livelihoods of the many men and women they employ. This Court should grant certiorari and reverse the Ninth Circuit's ruling on this exceptionally important question.

### SUMMARY OF ARGUMENT

The Ninth Circuit's ruling was based on a fundamental misunderstanding of how mines actually operate and the unique regulatory framework that Congress, the Corps, and the EPA have fashioned to



account for those operations. For decades, mines have disposed of “tailings”—the wet, ground-up, excess rock and sand left over after ore is processed—by pumping them into segregated impoundments where they can settle over time. These impoundments, or “tailings ponds,” are often created by damming an existing stream or pond and pumping the wet sand and rock particles into the enclosure for secure storage. The EPA and the Corps have consistently regulated discharges into such carefully engineered tailings ponds as “fill” under Section 404 (33 U.S.C. § 1344). By contrast, they have regulated liquid that might seep or drain *from* the tailings ponds into *other* bodies of water as “effluent discharges” under Section 402 (33 U.S.C. § 1342).

The panel ignored this important dichotomy. By overlooking the deliberate distinctions the EPA and the Corps drew between materials deposited *in* a secure and segregated tailings pond (the “fill” covered by Section 404) and the liquid that eventually may—or may not—flow *from* that isolated tailings pond (the effluent discharges covered by Section 402), the panel reached a result that upsets more than 30 years of regulatory history and industry practice.

Understanding how tailings are actually disposed of, and why Congress and the agencies treat “fill material” differently from effluent discharges, resolves the key concern that animated the Ninth Circuit’s decision: that mines will be able to bypass EPA’s effluent-discharge limits and indiscriminately discharge pollutants into American waterways so long as they mix them with a bit of tailings, call it “fill,” and obtain a permit from the Corps under

Section 404. *See* Pet. App. 16a-17a; *see also* SEACC C.A. Br. 37. This parade of horrors will not come to pass if the Corps’ “fill material” regulation is enforced as written. That is because, under Section 404, the Corps grants permits for tailings placements only when they will be deposited into secure impoundments that have been precisely engineered and designed for placements. And like their Section 402 counterparts, permits issued under Section 404 require mine operators to satisfy strict environmental standards—standards further buttressed by the EPA’s authority to veto any Section 404 permit.

The Ninth Circuit’s rule is also entirely unworkable. After all, tailings naturally contain materials—from iron to manganese to “suspended solids”—that are the subject of effluent limitations. And tailings ponds, by design, are filled with large quantities of these materials—in amounts that far exceed the strict parts-per-million limitations on effluent discharges that Section 402 establishes. The upshot of the Ninth Circuit’s rule—which applies Section 402’s effluent limitations even to tailings stored in secure, specially designed containments—is to effectively outlaw tailings ponds altogether. That result would not only conflict with settled industry and regulatory practice, but it would leave many mines with virtually no viable alternative and force them to shutter operations. The reason: In many areas of the country—particularly where much of the land is covered with wetlands and streams or criss-crossed with ephemeral drainages and similar bodies of water—the *only* feasible way to store tailings is in a tailings pond.

## REASONS FOR GRANTING THE WRIT

### I. THE NINTH CIRCUIT'S NEW RULE FUNDAMENTALLY MISUNDERSTANDS HOW MINES OPERATE AND HOW THEY HAVE BEEN HISTORICALLY REGULATED.

Congress devised a separate Section 404 permitting scheme to account for the unique nature of fill material and industry practice. The EPA and the Corps likewise paid close attention to these practical aspects in fashioning a unique regulatory regime for “fill material.” But the Ninth Circuit ignored this crucial history. That oversight led it to interpret the Clean Water Act in a way that not only belies that statute’s language but also threatens to debilitate mining operations that the industry has used with regulatory approval for more than 30 years. This Court should grant the petition and reverse the Ninth Circuit on this extraordinarily important question.

#### A. American Mines Have Traditionally Used “Tailings Ponds” To Store The Wet Tailings Left Over From Their Operations.

Mining operations dislodge large amounts of rock and earth, only a small percentage of which contain ore. The initial process of separating ore-containing rock from the rest is called “beneficiation.” *See generally* EPA, *Technical Resource Document: Extraction and Beneficiation of Ores and Minerals*, EPA 530-R-94-013 (Aug. 1994).<sup>2</sup> After beneficiation is complete, the ore-containing rock is shipped off for further processing; the material left behind is known

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<sup>2</sup> Available at [www.epa.gov/epaoswer/other/mining/techdocs/gold.pdf](http://www.epa.gov/epaoswer/other/mining/techdocs/gold.pdf).

as “tailings.” Tailings are, as the Ninth Circuit acknowledged, nothing more than ground-up rock and earth. Pet. App. 4a. And they frequently have a muddy consistency because beneficiation often involves combining the mined rock and earth with water and chemicals in order to separate out ore-bearing materials. *See Development Document for Final Effluent Limitations Guidelines and New Source Performance Standards for the Ore Mining and Dressing Point Source Category* 18-26, EPA No. 440/1-82/061 (Nov. 1982) (“1982 Development Document”).<sup>3</sup> Some of that water remains mixed in the tailings after the process is complete, leaving the tailings in semi-solid or “slurry” form. *See SER 295-296* (Knight Piesold Consulting, *Coeur Alaska, Inc. Kensington Project: Slate Creek Lakes Tailings Storage Facility Report on Water Quality Monitoring* 8-9 (Feb. 2003)).<sup>4</sup>

The mine, in short, is left with massive quantities of muddy, ground-up rock to dispose of. And while some of these tailings can be reinserted into the mine, many tons cannot. That is because “rock taken from its natural state and broken up naturally ‘swells,’ perhaps by as much as 15 to 25%.” *Bragg v. West Virginia Coal Ass’n*, 248 F.3d 275, 286 (4th Cir. 2001). Mines therefore rely on storage facilities to hold the excess tailings. These facilities are sometimes on land. There, the tailings are dried and stacked in a designated area, creating a mound that may be 200 to 300 feet high. *See Mining Foundation*

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<sup>3</sup> Available at <http://nepis.epa.gov/EPA/html/Pubs/pubtitleOAR.htm>.

<sup>4</sup> “SER” refers to the Supplemental Excerpts of Record filed in the Court of Appeals.

of the Southwest, *Dry Tailings—An Alternative to Conventional Tailings Management* (2006).<sup>5</sup>

But depending on the surrounding topography and climate, many mines cannot employ this dry-stacking technique. For these mines, the solution for the last 30 years has been to build a “tailings pond.” A tailings pond is made by (1) creating an embankment or a containment dam, often encircling an existing body of water, and then (2) pumping the wet tailings into the impounded area for storage. The tailings-pond method has several advantages. First, it avoids the creation of huge, unsightly mountains of tailings. Second (and as discussed further *infra* at 16-19), it may be the only feasible disposal technique in large portions of the country where the landscape is so heavily dotted with wetlands and streams or criss-crossed with ephemeral drainages that dry disposal is virtually impossible. And third, because the impoundment is securely walled off, it ensures that the solids and minerals in the tailings will not flow into a nearby water supply.

**B. For At Least 30 Years, Federal Agencies Have Applied Effluent Limitations Only To The Discharges *From* Tailings Ponds, Not To The Deposits *Into* Tailings Ponds.**

For many years, the EPA and the Corps have consistently taken a bifurcated approach to tailings ponds. On the one hand, they have authorized tailings deposits *into* the tailings ponds as “fill” under Section 404. On the other hand, they have

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<sup>5</sup> Available at [http://www.mge.arizona.edu/pdf/MFSW\\_vol2\\_no3\\_ver1.pdf?PHPSESSID=bec59fef13c91fd3c649f66b0c6f4aa6](http://www.mge.arizona.edu/pdf/MFSW_vol2_no3_ver1.pdf?PHPSESSID=bec59fef13c91fd3c649f66b0c6f4aa6).

applied Section 402 and its effluent limits<sup>6</sup> to any subsequent release of liquids *from* those tailings ponds that might reach non-impounded waters.

This regulatory dividing line makes good sense. Tailings (even wet tailings) are largely made up of rock and minerals. They cannot be assimilated into bodies of water like the microscopic effluents regulated under Section 402 can. Tailings instead displace water and create either dry land or a water body of a different size and shape. They therefore fall squarely into the regulatory definition of “fill material” that triggers Section 404 permitting: material that “has the effect of \* \* \* [r]eplacing any portion of a water of the United States with dry land” or “[c]hanging the bottom elevation of any portion of a water of the United States.” 33 C.F.R. § 323.2(e). And because they are largely solid, the tailings cannot possibly meet Section 402’s associated effluent limitations, which typically cap mineral and solids contents in water at some small number of parts per million. *See, e.g.*, 40 C.F.R. 440.104(a). These limitations, in short, were never meant to apply to tailings.

1. The EPA and the Corps have recognized for more than 30 years that mine operators, so long as they comply with Section 404, may cordon off small bodies of water and use them to store wet tailings as fill material in isolation from other water bodies. Throughout that time, the EPA and the Corps have likewise recognized that Section 402 and its associated effluent limitations do not apply to the discharge of tailings into those isolated tailings ponds.

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<sup>6</sup> *See* 33 U.S.C. §§ 1311, 1316.

Rather, Section 402 comes into play only if there is a discharge of pollutants from the tailings-storage facility into downstream waters.

The agencies have consistently hewed to this regulatory division of labor. In 1985, the Corps issued a Section 404 permit that authorized the Red Dog mine in Alaska to place lead and zinc tailings into an impoundment made from wetlands and a creek. *See* SER 836, 978-979. Even though the tailings were discharged as slurry, and even though there is an effluent limitation for discharges from lead and zinc mines, *see* 40 C.F.R. § 440.104, only a Section 404 permit was required for deposits into the tailings pond. Discharges from the tailings pond to adjacent non-impounded waters, however, were subject to Section 402. *See* SER 836. Likewise, in 1994 the Corps issued a Section 404 permit for the Fort Knox gold mine's tailings impoundment, made from a creek and adjacent wetlands. *Id.* at 837, 983-991. This tailings pond also did not require a Section 402 permit. *Id.* at 837.

This same regulatory approach to tailings ponds continued through the more recent EPA and Corps rulemaking. In the 2000 document proposing the current definition of "fill material," for instance, the agencies discussed a common technique by which excess coal-mining residue ("overburden") is placed in valley streams, with dammed "sedimentation ponds" built downstream to catch and isolate any runoff from the fill. *See* 65 Fed. Reg. 21,292, 21,295 (Apr. 20, 2000). The agencies wrote that the fill and the sedimentation ponds "should be regulated under CWA section 404"; by contrast, effluent subsequently "discharged into waters of the U.S. *from* sedimenta-

tion ponds” would require Section 402 permits. *Id.* at 21,295-96. And, of course, the final regulations confirm this approach in clear terms. The promulgating document stated that “EPA has *never* sought to regulate fill material under effluent guidelines,” 67 Fed. Reg. 31,129, 31,135 (May 9, 2002), and the regulations themselves define “discharge of fill material” to include “placement of overburden, *slurry*, or *tailings* or similar mining-related materials.” 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2 (emphases added).

Finally, the Corps and EPA’s longtime approach was never altered during the decade-long review of the Kensington project. In 1994, the EPA wrote that an earlier Coeur plan, which proposed building a tailings impoundment in a creek, implicated Section 402 in only one respect: “whether or not \* \* \* a discharge *from the impoundment* would meet applicable effluent limits.” *See* SER 446 (EPA, *Kensington Gold Mine Project: Technical Assistance Report for the U.S. Army Corps of Engineers Alaska District v* (Oct. 1994)) (emphasis added). In August 2004, the EPA likewise wrote that certain Section 402 requirements applied not to the tailings pond itself, but only to “discharge *from*” the pond “into East Fork Slate Creek.” *See* SER 427 (EPA, *EPA’s Detailed Comments on the Kensington Gold Project* (Aug. 2004)) (emphasis added). In June 2005, the EPA wrote that a Section 402 permit was required only for “discharge *from* the tailings storage facility.” *See* SER 536 (EPA, *Record of Decision for Section 402 NPDES Permit 3* (June 28, 2005)) (emphasis added). And in March 2006, the Corps noted that discharge of water to the downstream Slate Creek—but not discharge of wet tailings into the tailings pond—was



subject to a Section 402 permit. *See* SER 556 (Corps, *Record of Decision and Permit Evaluation 2* (Mar. 29, 2006)).

2. Thus, until the Ninth Circuit’s decision in this case, both regulators and industry enjoyed a clear understanding of how the Clean Water Act applies to tailings ponds: Section 404 applies to the discharge of tailings into segregated pools designed to capture pollutants, while Section 402 applies to the discharge of pollutants into downstream waters. That fundamental distinction—a distinction codified in the Act, recognized by federal regulation, and put to practice by industry—no longer exists in the Ninth Circuit.

The Court of Appeals all but acknowledged that its ruling was based less on what the EPA and the Corps’ regulations require for fill material and more on its own sense of how the EPA and the Corps should regulate fill material. After all, the panel conceded that the agency’s interpretation of its own regulation did indeed “facially meet[]” the regulation, but was nevertheless (somehow) “inconsistent with the regulation.” Pet. App. 9a. It reached this curious—and plainly incorrect result (*see* Pet. 28-29)—based on its own freewheeling study of regulatory history and mining practice. The result of this effort was to conclude that, unless the agencies hewed to the court’s own preferred interpretation of the Clean Water Act, mines would bypass the EPA’s effluent-discharge limits and indiscriminately discharge pollutants into American waterways so long as they mixed them with a bit of tailings, called it “fill,” and obtained a permit from the Corps under Section 404.

The Ninth Circuit’s decision underscores the perils that ensue when judges freelance into matters that

Congress has assigned to expert executive agencies. For it not only misunderstood the history and industry practice that it purported to study, but those misunderstandings then led it to adopt a results-oriented interpretation aimed at preventing a parade of horrors that has never materialized during the past 30 years.

*First*, the panel's understanding of the regulatory history—a major underpinning of its opinion—was mistaken. Seemingly unaware of the traditional regulatory distinction between permits that regulate what goes into a tailings-storage facility and what escapes from it, the panel misunderstood the principal documents on which it relied. The panel, for example, concluded that the EPA and the Corps have always contemplated application of Section 402 to tailings deposits. In support of this conclusion, the panel wrote: “[A]s late as 2005, EPA informed Coeur Alaska that ‘[b]ecause this project would be a new source, the New Source Performance Standards (NSPS) for gold mines and mills are applicable to the project.’ ” Pet. App. 29a (citing EPA, *Record of Decision for Section 402 NPDES Permit 3* (June 28, 2005)). The panel had the significance of this passage exactly backwards. The passage is part of a paragraph applying Section 402 and the effluent limitations only to discharges *from* the tailings pond, not *into* the tailings pond. See SER 536 (“The [NPDES] application addresses \* \* \* the proposed discharge from the tailings storage facility (TSF) in Lower Slate Lake.”); see also *id.* 539-540. The passage thus confirms what the Act and regulatory framework make clear: that Section 404 applies to discharges into a tailings-storage facility; Section 402 applies to discharges that escape from that facility.

*Second*, the panel's interpretation of the Act conflicts with the agencies' consistent understanding and application of the same provisions over the past 30 years. The panel concluded that "when a discharge is subject to an effluent limitation," it "must comply with \* \* \* § 402." Pet. App. 17a. But that has never been so in the context of tailings deposited into impoundments—even when those tailings contain some moisture that, standing alone, might be deemed process water subject to effluent limitations. Instead, those wet tailings have long been permitted under Section 404. *See supra* at 8-16; *Kentuckians for the Commonwealth*, 317 F.3d at 431 (noting that "[t]he Corps' exercise of authority \* \* \* to permit [valley fills that cover streams] in connection with mining operations was consistent with its past practices"). This longstanding interpretation is entitled to "particular deference." *Barnhart v. Walton*, 535 U.S. 212, 219-220 (2002) (citing *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522 n. 12 (1982)); *see also Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461, 488 (2004) (refusing invitation to "reject as impermissible EPA's longstanding, consistently maintained interpretation"). The Ninth Circuit refused to accord the agencies' interpretation "particular deference" because of its own idiosyncratic reading of the regulatory record.

*Third*, the limiting principle that the Ninth Circuit feared missing from the agencies' interpretation has been present all along. Respondent SEACC argued, and the Ninth Circuit appeared to accept, that "[u]nder Defendants' interpretation of the Act, any waste byproduct from an industrial facility would escape effluent limits and performance standards if the discharge happens to contain a significant com-

ponent of suspended solids.” SEACC Br. 37. But that is not so. For at least 30 years, the EPA and the Corps have required that the tailings be deposited in “specified disposal sites,” 33 U.S.C. § 1344(a)—namely, in secure, impounded tailings ponds that prevent the liquid components of the deposit from commingling with surrounding waters. These tailings ponds accept huge quantities of crushed rock and dirt that indisputably change the bottom elevation and thus fall comfortably within the agencies’ definition of “fill material.” *See* 33 C.F.R. § 323.2(e). The Ninth Circuit’s quest for a limiting principle is therefore unnecessary. Tailings ponds are well-regulated phenomena that bear no resemblance to the environmentally apocalyptic vision of companies dumping polluted water into open rivers and lakes and calling it “fill” based on some microscopic elevation change.

Moreover, it is important to recognize that Section 404 permits are not up for grabs for all comers. To the contrary, Congress mandated that the Corps must follow guidelines jointly promulgated by the EPA and the Corps. *See* 33 U.S.C. § 1344(b). Known as the 404(b)(1) Guidelines, these standards require the Corps to determine (i) whether aquatic impacts of a proposed discharge have been avoided to the extent practicable; (ii) whether any remaining impacts have been minimized; and (iii) whether the discharger should compensate for unavoidable losses through restoration, creation, enhancement, or preservation of aquatic resources. *See* 40 C.F.R. §§ 230.5; 230.10(a), (d); 230.70-77. As the EPA and the Corps have recognized, the 404(b)(1) Guidelines ensure that mining operations “avoid adverse impacts and offset unavoidable adverse impacts.”

Army-EPA Memorandum of Understanding Concerning Mitigation Under Clean Water Act § 404(b)(1) Guidelines, *reprinted at* 55 Fed. Reg. 9210, 9211 (Mar. 12, 1990). The Ninth Circuit was therefore exactly wrong to reject the agencies' longstanding interpretation out of a speculative and ill-defined concern that mines would be able to circumvent the Clean Water Act.

**II. THE NINTH CIRCUIT'S READING OF THE ACT WILL MAKE IT NEARLY IMPOSSIBLE FOR MANY MINES TO LEGALLY STORE THEIR TAILINGS.**

This is not a case in which an appellate court's error will have little practical effect. Just the opposite. The impact of the panel's newly minted rule will be devastating to the mining industry and, by extension, the economies of many States that depend on productive and environmentally responsible mines. That is because the Ninth Circuit's ruling effectively adopts by judicial fiat a categorical ban on an established industry practice that—if outlawed—would make it virtually impossible, or at least extraordinarily burdensome, for mines to legally dispose of tailings and other excess rock and dirt from their mining operations.

1. In large swaths of the nation where a significant proportion of American mines are located—Alaska, the mountain West, the arid Southwest, and portions of the Midwest and Appalachia—the terrain surrounding ore deposits is covered with wetlands and streams. In Alaska, for example, 170 million acres, or 43% of the State, consist of wetlands. *See*

Corps, Alaska District Website.<sup>7</sup> And in the Appalachian Mountains—stretching from Pennsylvania to Alabama and running through Kentucky, Virginia, and West Virginia—the bottom of mountain hollows are the only stable locations that mines have to place excess rock. As a basic matter of topology, these hollows naturally form streams, which in turn, are regulated as waters of the United States under the Clean Water Act.

Mining operations throughout the country—from Alaska to Appalachia and many areas in between—will often have “no practicable alternative” other than to store tailings in impoundments created by walling off an existing pond, stream, or other wetland. SER 1043 (*Response to Comments Document for Final Rule Amending the EPA’s and Corps’ CWA § 404 Definitions of “Fill Material” and “Discharge of Fill Material”* 35 (May 3, 2002)). Indeed, that was the case with the Kensington mine. As petitioner Coeur Alaska explained to the panel below, even the “dry” tailings option contemplated in an earlier version of the Coeur plan would have involved “filling and permanently destroying more than 100 acres of wetlands—an area five times the size of Lower Slate Lake.” C.A. Br. of Coeur Alaska 16. Given the broad reach of the Act, which extends not just to traditional navigable waters but also perhaps to all wetlands and streams with “sufficient nexus” to navigable waters to affect their “integrity,” *Rapanos v. United States*, 126 S. Ct. 2208, 2249 (2006) (Kennedy, J., concurring in the judgment), most such

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<sup>7</sup> Available at <http://www.poa.usace.army.mil/hm/default.htm>.

wetlands are subject to federal permitting requirements.

2. The panel's statutory construction renders tailings ponds unpermissible in a wide range of situations. That is because the EPA has promulgated effluent limitations for a vast number of substances commonly present in the excess rock and dirt from mines located throughout the country. For example, process water from froth-flotation mills is governed by an effluent limitation not just for gold mining, but also for mining of copper, lead, zinc, silver, and molybdenum. *See* 40 C.F.R. § 440.104(b)(1). Likewise, coal processing operations are governed by effluent limitations capping the iron, manganese, and "total suspended solids" that may be present in the discharge. *See id.* § 434.22. Phosphate mines are governed by an effluent limitation that caps the total suspended solids that may be present in process water from those operations. *See id.* § 436.182. And the list goes on. *See generally id.* Pts. 434, 440. Under the panel's reading of the Act, the tailings produced by all such mines would be subject to effluent limitations, even though they cannot possibly meet those limitations. How, for example, is a tailings deposit that may be more than half solid to meet a "total suspended solids" limit measured in terms of parts per million?<sup>8</sup>

The bottom line is that, under the Ninth Circuit's approach, many mines could no longer use the long-accepted tailings-pond technology. And because the only other established disposal practice—dry-stacking—is topographically impossible or exorbi-

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<sup>8</sup> *See* 40 C.F.R. § 440.104(a).

tantly cost-prohibitive in areas like Alaska, the mountain West, the arid Southwest, and portions of the Midwest and Appalachia, the Ninth Circuit's decision may make it impossible for these mines to legally dispose of their tailings. That result would not only undermine 30 years of industry practice; it would jeopardize a vital industry and the economies of the States in which these mines play such an important role. *See Surface Mining* 1 (Bruce A. Kennedy ed., 2d ed. 1990) ("Mining was the second of man's endeavors—agriculture was the first. Since prehistoric times, mining has been integral and essential to man's existence.").

### CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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